No. 82-2045

In the Supreme Court of the United States

OCTOBER TERM, 1983

COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a/k/a COMPACT), ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Commerce is authorized under 19 U.S.C. 1617 to compromise claims for dumping duties imposed upon imported television receivers.

2. Whether petitioners' allegations that the Secretary acted in bad faith in compromising claims for dumping duties is judicially reviewable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 706 F.2d 1574. The opinion of the Court of International Trade (Pet. App. 10a-19a) denying petitioners' application for a preliminary injunction is reported at 551 F. Supp. 1142. The opinion of the Court of International Trade granting partial summary judgment in favor of the United States with respect to one count of the original complaint is reported at 527 F. Supp. 341.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1983. The petition for a writ of certiorari was filed on June 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 617 of the Tariff Act of 1930, 19 U.S.C. 1617, provides:

> Upon a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury [1] is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

STATEMENT

1. Petitioners are associations of manufacturers and labor unions in the domestic television industry. In March 1981, petitioners brought this action in the Court of International Trade ("CIT") challenging the decision by the Secretary of Commerce, acting pursuant to Section 617 of the Tariff Act of 1930, 19 U.S.C. 1617, to settle certain claims for dumping duties imposed upon television receivers imported from Japan between July 1, 1973, and March 31, 1979.[2] Petitioners' action was filed less than one year

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[1]Although the statute refers to the Secretary of the Treasury, the authority contained in the statute was transferred to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979), *reprinted in* 19 U.S.C. (Supp. V) 2171 note; Exec. Order No. 12, 188, 45 Fed. Reg. 989 (1980). Petitioners do not challenge this transfer of authority.

[2]These receivers were subject to a dumping finding known as T.D. 71-76, 36 Fed. Reg. 4597 (1971). The settlement at issue here provides for the payment to the government of a total of $66 million in settlement of claims for dumping duties. In addition, the Secretary of the Treasury approved a settlement totalling $11 million in claims against four importers for potential penalties under 19 U.S.C. (Supp. V) 1592. Although petitioners originally challenged the settlement of the claims for penalties, they apparently have abandoned this challenge.

after the filing of a similar suit in the same court by the Zenith Radio Corporation.[3]

The complaints in the two cases challenged the Secretary's settlement decision on two grounds. They alleged that (1) Section 617 did not authorize the Secretary to compromise claims for dumping duties; and (2) even if the Secretary possessed the authority to enter into the settlement, he exercised that authority in bad faith. Pet. App. 2a. In December 1980, the CIT issued a preliminary injunction prohibiting implementation of the settlement. *Zenith Radio Corp.* v. *United States*, 505 F. Supp. 216.

2. Thereafter, in an appeal that arose out of a discovery dispute in the *Zenith* case, the Court of Customs and Patent Appeals held, *inter alia*, that the Secretary was empowered under Section 617 to enter into the settlement and, because that statute provided "no law to apply," the merits of the Secretary's decision to settle the claims were not subject to judicial review. *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254, 1259-1260 (1982), cert. denied *sub nom. Zenith Radio Corp.* v. *United States*, No. 82-166 (Oct. 18, 1982) ("*Zenith*"). The court concluded that Zenith could challenge the settlement, if at all, only on the ground that the Secretary failed to comply with the procedures set forth in Section 617. It noted, however, that Zenith's complaint did not allege that the Secretary had failed to comply with those procedures. 673 F.2d at 1262. In addition, the court rejected Zenith's invitation to "look behind the apparent regularity of the procedures into the motives for

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[3]The factual background of the case is summarized in the government's brief in opposition to the petition for a writ of certiorari in *Zenith Radio Corp.* v. *United States*, cert. denied, No. 82-166 (Oct. 18, 1982). We are sending petitioners a copy of our brief in opposition in *Zenith*. (Because Zenith had engaged in substantial discovery prior to the institution of this suit, the cases were not consolidated.)

settlement." *Id.* at 1263. Relying on *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941), the court held that Zenith could not "inquire into the merits of the settlement or into the Secretary's mental processes in deciding upon settlement in the guise of a challenge to procedure." 673 F.2d at 1264.[4] The case was remanded to the CIT with directions to dismiss Zenith's action for lack of jurisdiction.

3. Following the decision in *Zenith*, petitioners moved for leave to amend their complaint in this case. In Count I of their proposed amended complaint, petitioners repeated the allegations contained in their original complaint to the effect that the Secretary lacked authority to enter into the settlement. Pet. App. 21a.[5] In Count V of their proposed amended complaint, petitioners also repeated their allegation that, if the Secretary possessed the authority to enter into the settlement, he exercised that authority in bad faith. *Id.* at 27a-32a.

The principal difference between petitioner's proposed amended complaint and their original complaint was the inclusion in the proposed amended complaint of three additional counts which alleged that, in entering into the settlement agreements, the Secretary failed to comply with the procedural requirements contained in Section 617. Pet. App. 21a-27a. In Count II, petitioners alleged that the Secretary's decision was not made upon a report by any of the officials enumerated in Section 617. Pet. App. 22a. Count III alleged that the General Counsel's recommendation to the Secretary of Commerce contained "statements

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[4]The court noted that Zenith's allegations of bad faith were "speculative" and "perfunctory." 673 F.2d at 1264 & n.17.

[5]Petitioners admitted that the court in *Zenith* had rejected similar allegations in Zenith's complaint, but they contended that they wished to preserve their position on this count (C.A. App. 151, 157-158). "C.A. App." refers to the appendix in the court of appeals.

and opinions of law and fact that were false, misleading, and not supported by the record upon which the Secretary's decision was required to be based." *Id.* at 23a. In Count IV, petitioners alleged that the Secretary decided to compromise the claims before receiving the General Counsel's recommendation, and that even if the recommendation had been received prior to the Secretary's decision, the Secretary had insufficient time to read and comprehend the recommendation. *Id.* at 26a-27a.

Petitioners also requested the CIT to issue a preliminary injunction prohibiting implementation of the settlement (C.A. App. 615-616). Petitioners correctly anticipated that, in light of the decision in *Zenith*, the CIT would dissolve the preliminary injunction it had issued in that case in December 1980 (see page 3, *supra*). Petitioners contended that, in the absence of a preliminary injunction, the case would become moot.

The CIT granted petitioners' motion for leave to file an amended complaint. Pet. App. 10a n.1. The court denied the request for a preliminary injunction, however, concluding that there was little, if any, likelihood of success on the merits of petitioners' amended complaint. *Id.* at 10a-19a. The court consolidated the hearing on the merits of the amended complaint and entered judgment for the government on all of the counts of the amended complaint. *Id.* at 20a.

The CIT subsequently denied petitioners' motion for an injunction pending appeal. C.A. App. 772-773. On December 2, 1982, however, the Court of Appeals for the Federal Circuit granted petitioners' motion for an injunction pending appeal and ordered that the appeal be expedited.

4. On May 2, 1983, the court of appeals affirmed the judgment of the CIT dismissing petitioners' amended complaint and dissolved the injunction it had issued pending

appeal. Pet. App. 1a-8a. The court observed (*id.* at 4a) that the challenge to the Secretary's authority to compromise the assessment of antidumping duties under Section 617, contained in Count I of the amended complaint, was virtually identical to the challenge that had been rejected in *Zenith*. The court concluded that it remained "unpersuaded that section 617 does not include the power to settle dumping duty claims, or that the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), altered or limited that power." Pet. App. 4a.

The court of appeals also rejected petitioners' procedural challenges (Pet. App. 5a-7a). With respect to petitioners' contention in Count II that a memorandum prepared by the General Counsel, which addressed each of the criteria required in a Section 617 report, did not qualify as a "report" within the meaning of Section 617 because the General Counsel is not one of the officials designated in the statute for preparing such a report, the court stated that petitioners' construction of the statute would lead to absurd results: it would permit the General Counsel's subordinates to prepare a Section 617 report but would bar the General Counsel himself from preparing it (Pet. App. 6a). As to petitioners' claim in Count III that the General Counsel's recommendation contained false and misleading statements and legal opinions, the court ruled that petitioners' request for review of "the contents of that recommendation for accuracy and validity * * * falls squarely within the proscription of" *Zenith* (Pet. App. 6a). Addressing the allegations in Count IV that the Secretary's decision to settle was made before receipt of the General Counsel's recommendation and that, even if the recommendation had been received beforehand, the Secretary had insufficient time to comprehend the facts, the court noted that the Secretary was familiar with the case and had been monitoring developments closely before he received the recommendation,

and thus the short time span between receipt of the recommendation and execution of the settlement agreements raised no presumption that the Secretary failed to make a reasoned and informed decision (*id.* at 7a). In this connection, the court, citing *United States* v. *Morgan, supra*, observed that it is "beyond the proper role of the courts to inquire of the Secretary what weight he gave to the various factors in reaching his decision," and that, "in any event, the Secretary is not limited solely to the factors explicated in these reports" (Pet. App. 7a).

Finally, the court of appeals rejected petitioners' claim in Count V that the Secretary's exercise of his settlement authority was undertaken in bad faith because, in recommending settlement, the General Counsel allegedly understated the maximum amount of duties the government might collect in the absence of a settlement, and failed to inform the Secretary that the amount of duties ultimately collected might increase if domestic producers were successful in challenging the methodology used by the Department of Commerce in calculating the duties. The court remarked (Pet. App. 8a; emphasis in original):

> With respect to possible differences in the figures supplied by the General Counsel, the court in [*Zenith*] held, 673 F.2d at 1264, "[p]roving that the estimate in the report . . . was lower than what Zenith considers reasonable does not destroy the lawfulness of [*the Secretary's*] decision." * * * The trial court * * * correctly declined [petitioners'] invitation to inquire into the General Counsel's motivation.

5. On May 19, 1983, the court of appeals granted petitioners' motion to reinstate the injunction pending appeal. Thereafter, the court extended the injunction pending appeal until noon, June 20, 1983, and noted that it would not entertain any motions for a further injunction pending

appeal. On June 16, 1983, the Chief Justice denied petitioners' application for an injunction pending consideration of the petition for a writ of certiorari. The full Court denied a similar application on June 27, 1983.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of this Court or any other court of appeals, and does not warrant review. Moreover, review is not warranted here for the additional reason that this case will soon become moot.

1. The trial court correctly noted in the *Zenith* case that in the absence of interlocutory injunctive relief, the Secretary would implement the challenged settlement and that, implementation of the settlement would moot the controversy. *Zenith Radio Corp.* v. *United States*, 16 Cust. Bull. No. 30, at 15 (Ct. Int'l Trade June 29, 1982). Petitioners, in their various requests for interlocutory relief, repeatedly recognized that this principle was directly applicable to this case.

As noted above (see page 7, *supra*), the injunction pending appeal issued by the court of appeals expired at noon on June 20, 1983, and this Court declined to issue an injunction pending disposition of the petition for a writ of certiorari. Accordingly, the Secretary has proceeded to implement the settlement.

The agreements implementing the settlement required the government to use a particular methodology in "liquidating" [6] the relevant entries of television receivers subject to T.D. 71-76, 36 Fed. Reg. 4597 (1971). By statute, once these liquidations occur, they will become final and conclusive. 19 U.S.C. (& Supp. V) 1514(a). The only purpose of

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[6] "Liquidation" is defined in 19 C.F.R. 159.1 (1981) as "the final computation or ascertainment of the duties * * * accruing on an entry" of merchandise into the customs territory of the United States.

this lawsuit was to prevent the entries from being liquidated in the manner specified in the settlement agreements. Many of the entries have now been liquidated in that manner and further liquidations are occurring on a daily basis. Because those liquidations are final and conclusive, it follows that this suit will soon become moot. See *Brockington* v. *Rhodes*, 396 U.S. 41, 43 (1969). Accordingly, the petition should be denied.[7]

2. In any event, petitioners' claims are without merit. Petitioners first contend (Pet. 13-16) that the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, modified the authority granted to the Executive Branch by 19 U.S.C. 1617 to compromise "any claim arising under the customs laws." Petitioners cite absolutely no authoritative support for their position, however. Moreover, this claim is virtually identical to one of the claims presented in the petition for certiorari in *Zenith Radio Corp.* v. *United States*, cert. denied, No. 82-166 (Oct. 18, 1982), and there is no greater reason to grant review here.

The Trade Agreements Act itself does not refer to the compromise authority contained in Section 617, and nothing in its legislative history indicates a congressional intent to affect that authority.[8] As the CIT correctly held in the

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[7]This case is not capable of repetition yet evading review. See *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). There is no assurance that the Secretary will ever again attempt to settle claims for dumping duties assessed upon entries subject to T.D. 71-76, 36 Fed. Reg. 4597 (1971). Moreover, as the lengthy history of this and related litigation demonstrates, if the Secretary at some time in the future attempts to settle claims for dumping duties pursuant to the authority contained in Section 617, it is clear that an aggrieved party with a likelihood of success on the merits could obtain injunctive relief to prevent implementation of the settlement until such time as he has obtained judicial review.

[8]Indeed, the very Congress that enacted the Trade Agreements Act approved the transfer of authority to administer the antidumping law from the Department of Treasury to the Department of Commerce. When Congress approved this transfer of authority, it explicitly recognized the existence of Section 617. See H.R. Rep. No. 96-585, 96th

Zenith case, since Section 617 and the Trade Agreements Act of 1979 "reflect different Congressional concerns and apply to different functions of the Secretary" (*Zenith Radio Corp.* v. *United States*, 509 F. Supp. 1282, 1287 (1981)), the two are easily reconciled and both may be given full effect. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). It would "surely do violence to the 'cardinal rule * * * that repeals by implication are not favored' " (*TVA* v. *Hill*, 437 U.S. 153, 189 (1978)), to hold, as petitioners assert, that the Trade Agreements Act of 1979 implicitly repealed the authority contained in Section 617 insofar as it pertains to claims for dumping duties.

Petitioners' argument, at bottom, amounts to nothing more than a wistful assertion that Congress logically could not have intended the Executive Branch to shortcut the procedures created by the Trade Agreements Act by settling dumping claims under Section 617. But that is like arguing that the United States may not settle civil cases or accept plea bargains in criminal cases, because by so doing it would be shortcutting the rules of civil and criminal procedure. The courts below correctly held that Congress intended the administrative and compromise processes to exist side by side, the former to be used when compromises either are not possible or are not considered in the interest of the United States, the latter to be used when they are.[9]

Cong., 1st Sess. 7 (1979). See also S. Rep. No. 96-402, 96th Cong., 1st Sess. 41 (1979). Congress did not, however, prohibit or restrict the use of the authority contained in that statute to settle claims for dumping duties.

[9]The law, of course, favors the resolution of disputes without litigation. Accordingly, courts have denied standing to those who are not parties to compromise agreements who nevertheless wish to challenge the validity of the agreements. See, *e.g.*, *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1360-1361 (9th Cir. 1979); *Smith* v. *South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978). The agreements here compromised differences between the government and

3. As already noted, in *Zenith* the Court of Customs and Patent Appeals held that the merits of the settlement were not subject to judicial review and that Zenith and other interested parties (such as petitioners) could challenge the settlement, if at all, only on the ground that the Secretary failed to comply with the procedural requirements of Section 617. 673 F.2d at 1262. In addition, the court held that

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various importers and thus obviated the need to resolve those differences through litigation. Petitioners are strangers to these agreements and do not possess an interest in the duties assessed upon the importers. *Louisiana* v. *McAdoo*, 234 U.S. 627 (1914). Thus, petitioners' standing to attack the settlements at issue in this case is far from certain.

The cases on which petitioners rely (Pet. 16 n.15) are not to the contrary. In *Local 1219, American Federation of Government Employees* v. *Donovan*, 683 F.2d 511 (D.C. Cir. 1982), the rights compromised by the government were those of the union members to a fair election. Here, the government is compromising its own rights. Both *United States* v. *City of Miami*, 664 F.2d 435 (5th Cir. 1981), and *United States* v. *Trucking Employers, Inc.*, 561 F.2d 313 (D.C. Cir. 1977), were employment discrimination cases in which the issue was whether the trial courts abused their discretion in affixing a "judicial imprimatur" (*United States* v. *City of Miami, supra*, 664 F.2d at 441) to a consent decree that affected the rights of third parties. In contrast, when the Secretary compromises a claim pursuant to Section 617, he does not seek a judicial imprimatur and, in any event, the rights of third parties are not involved.

In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court created a narrow exception to the general rule that, in the absence of specific statutory authority, third parties have no right to intervene in an antitrust case instituted by the United States. As explained in *United States* v. *International Telephone & Telegraph Corp.*, 349 F. Supp. 22, 26 (D. Conn. 1972), aff'd *sub nom. Nader* v. *United States*, 410 U.S. 919 (1973), the *Cascade* decision permitted intervention by a purchaser with a strong interest in competition among suppliers for the sole purpose of allowing that purchaser to demonstrate that a proposed settlement did not effectuate a prior mandate of this Court directing divestiture. Finally, the statement in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961), to which petitioners refer, constitutes dictum. The decision holds that a third party does not possess a right to intervene to contest a settlement between the United States and a third party and clearly does not support petitioners' position.

Zenith could not inquire into the merits of the settlement or into the Secretary's mental processes in the guise of a challenge to procedure and it noted that Zenith's allegations of bad faith were perfunctory. *Id.* at 1263-1264.

Although petitioners' amended complaint purported to allege that the settlement was invalid because Section 617's procedural requirements were not followed, both courts below rejected these claims and petitioners do not renew them in this Court. Instead, petitioners contend that their amended complaint contained "detailed" allegations of "bad faith." Specifically, petitioners claim (Pet. 17-19) that the report and recommendation contained factual and legal errors, that the Secretary did not receive these documents sufficiently in advance of his decision to comprehend their contents and that the settlement recommendation resulted from political pressures exerted by the Government of Japan. Thus, petitioners assert that the government's literal compliance with the procedural requirements of Section 617 was a sham. In effect, petitioners contend that, while they may not obtain judicial review of the merits of the Secretary's decision to enter into the settlement, they may obtain judicial review of the advice provided to the Secretary by his subordinates in order to determine, for example, whether this advice was based upon the facts and was balanced in its approach or whether, instead, the advice was motivated by improper factors. They assert a similar right to obtain judicial review of the precise circumstances surrounding the Secretary's decision.

The courts below correctly rejected this argument. Pet. App. 6a-8a, 17a-19a. To begin with, petitioners' argument assumes that the Secretary is limited, in making his decision, solely to the advice given to him by his subordinates. But, as the court of appeals observed (*id.* at 7a), "the Secretary is not limited solely to the factors explicated in the[] reports." The court in *Zenith* explained that there were

numerous factors that the Secretary could have considered apart from those attacked by petitioners as having been presented inaccurately in the reports (673 F.2d at 1264; footnote omitted):

> Proving that the estimate in the report to [the Secretary] was lower than what [petitioners] consider[] reasonable does not destroy the lawfulness of his decision. Currency fluctuations can play a role in evaluation. Moreover, the dollar amount agreed upon may have been the best figure which could be negotiated regardless of the size of the claim. In any event, it may well be that other considerations were of greater significance than the precise dollar amount of the Government claims. The settlement agreements required more from the importers than the payment of money. Not only were any possible challenges to the assessment of duties expressly waived, but also concessions were obtained requiring cooperation in submitting data and information with respect to future enforcement. A tremendous backlog of cases was inherited by the Secretary which may well have interfered with current work of his Department not only in this area but in all areas of his responsibility under the Act. We do not know what weight he gave to each of these considerations and, in any event, these are not matters for which the court may demand answers. To require an explanation for this type of discretionary Executive action fundamentally changes the nature and scope of judicial review. Moreover, a court cannot infer fraud or bad faith because the Secretary did not achieve as advantageous a settlement as the court may believe could have been made.

If, as seems clear, the Secretary can base a decision to enter into a settlement on factors beyond those included in the reports from his subordinates, petitioners' challenge to the validity of certain factors in the reports is of little, if any,

relevance. Moreover, as the court of appeals noted (Pet. App. 7a), the question whether the invalidity of any particular factor made a difference in the Secretary's decisionmaking process could be determined only by impermissibly probing the Secretary's mind. See *United States* v. *Morgan, supra*, 313 U.S. at 421-422.

Even if a court could review the circumstances surrounding the Secretary's decision where a substantial showing of bad faith or improper behavior has been made (see *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971)), petitioners have failed to make such a showing here. There is no substance to petitioners' claim that the Secretary did not have sufficient time to make a reasoned decision. As the court of appeals correctly concluded (Pet. App. 7a), "that only a few hours were available between receipt of the report and execution of settlement agreements raises no presumption" that the Secretary did not make a reasoned decision based on all the required information. Accord, *National Nutritional Food Association* v. *FDA*, 491 F.2d 1141, 1144-1146 (2d Cir. 1974). Moreover, as the court pointed out (Pet. App. 7a), "[petitioners] do[] not, and could not, assert that the report was the Secretary's introduction to the case. Without question he had been monitoring developments closely. The record precludes any inference that the Secretary was uninformed."

Finally, petitioners have failed to show that the General Counsel's recommendation in favor of settlement was the result of political pressure imposed by the Government of Japan. An examination of the amended complaint reveals that petitioners' "political pressure" theory is based upon the following syllogism: (a) when the Department of the Treasury was responsible for the administration of the dumping law, officials of that department conducted meetings, which were neither improper nor illegal in themselves, with representatives of the Government of Japan (C.A.

App. 74-79, 94-95); (b) these officials were motivated to take certain actions, which were not in themselves wrongful or illegal, solely as a result of these meetings (C.A. App. 75-79, 81); (c) the recommendation in favor of settlement submitted by the General Counsel of the Department of Commerce to the Secretary allegedly contains certain errors and these errors were deliberately included as the result of "extreme political pressure" (Pet. App. 27a) imposed by the Government of Japan.[10] But even if officials of the Department of the Treasury were motivated to take certain actions solely because of certain meetings and even if the General Counsel's recommendation contained errors that were deliberately included in the recommendation, it simply does not follow that the General Counsel of the Department of Commerce was motivated to include these errors for the same reason that, at a much earlier time, motivated officials of an entirely different government department to take other types of action. In any event, as the court concluded in *Zenith*, the decision at issue here was that of the Secretary of Commerce, and it is not "appropriate to infer bad faith in the Secretary's decision from the alleged transgressions of predecessors." 673 F.2d at 1264.

It is clear, therefore, that petitioners' allegations of bad faith are not sufficient to render the merits of the settlement subject to judicial review in circumstances where it is conceded that judicial review would otherwise be prohibited.[11]

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[10]The amended complaint alleges that the General Counsel was motivated "in a large part" by this pressure (Pet. App. 27a), but does not allege that he was not also motivated by reasons other than this pressure.

[11]This conclusion is clearly correct given the facts in this case. During the period between the decision in *Zenith* and the filing of the amended complaint, petitioners were erroneously permitted to conduct discovery. In the course of this discovery, petitioners examined 250,000 pages of documents and took 15 depositions, including those of officials of the Department of Treasury and the General Counsel of the Department of Commerce. The amended complaint does not refer to these documents

To hold otherwise in the circumstances of this case "would threaten to swallow the rule of nonreviewability." *Baker* v. *International Alliance of Theatrical Stage Employees*, 691 F.2d 1291, 1296 (9th Cir. 1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

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or, most importantly, to the depositions. The reason is obvious. Despite this extensive discovery, petitioners were unable to locate any evidence to support their allegations of bad faith.